Chan Cheen Ken & Anor v Cristlina @ Cristilla Korok & Anor

HIGH COURT (KOTA KINABALU) — NO KK-22–132 OF 2011
DAVID WONG J
29 JUNE 2012

Tort — Defamation — Defences — Justification — Burden of proof — Insinuations or innuendoes that plaintiff was having incurable and contagious skin problem — Failure to prove contagious skin problem — Wether defence of justification failed

Tort — Defamation — Defences — Qualified privilege — Statements made in letter of complaint to relevant authority — Malice not proven — Whether letter of complaint protected by qualified privilege — Defamation Act 1957 s 8

Tort — Defamation — Libel — Statements made in letter of complaint to relevant authority — Statements published in website — Statements published in newspaper article — Insinuations or innuendoes that plaintiff was having incurable and contagious skin problem and that plaintiff was a sex pervert — Whether publications defamatory — Whether defamatory imputations were true — Whether defences of qualified privilege and justification available

The plaintiffs' claim was for damages premised on three alleged defamatory publications caused or made by both the defendants as follows: (a) The letter of complaint circulated by the first defendant to Jabatan Perkhidmatan Kebajikan Am Negeri Sabah ('JPKANS'); (b) The online publication in the website at the web address of www.iusticetomyson.blogspot.com ('the online publication') regarding the same complaint; and (c) a newspaper article. The plaintiffs were husband and wife and were the sole proprietor and principal of 'Starkids Nursery Playschool' ('nursery'). The defendants had enrolled their one year old son McCain Lai in the nursery. According to the first defendant, there were several occasions where bruises or other injury were found on McCain's body when she went to pick him up from the nursery. The first defendant also claimed that she noticed the skin on the first plaintiff's fingers was very dry and they were peeling off. The defendants claimed that when they demanded for a refund of the school fees, the first plaintiff became angry, trying to unzip his pants and said 'What do you want me to show you, why should I show you, I show you this lah'. As a result of the incident, it was alleged that the defendants had caused the three publications to be made. The first defendant's allegation was that the first plaintiff had a 'skin problem' and he had attempted to show

his genital to the defendants. The plaintiffs claimed that the words used in the online publication gave rise, inter alia, by way of insinuation and/or innuendoes that the first plaintiff: (a) was dirty was not healthy; (b) had an incurable and contagious skin problem on his fingers; (c) was a health risk and ought to be shunned; (d) was a sexual/sex pervert and was prone to taking off his trousers and to flash his private part; and (e) was sick in the mind and posed a sexual risk to children and women. The issues arising to be determined were: (i) whether the three publications were defamatory; and (ii) if they were defamatory, whether the three defamatory imputations were true pursuant to s 8 of the Defamation Act 1957.

Held, allowing the plaintiffs' claim with costs:

(1) The letter of complaint could be dealt with in the context of qualified privilege. This immunity is taken away if it is found that there exists actual malice on the part of the defendants. The defendants as parents were entitled to lodge a complaint to the relevant authority and when such authority was under a legal obligation to hear such complaints, the letter was protected by the concept of qualified privilege. The relevant authority in this case was JPKANS. Further there was no evidence of malice on the part of the defendants, and as such the letter of complaint was protected by qualified privilege. Hence, it was unnecessary to determine whether that letter was defamatory (see paras 8–12).

(2) The letter of complaint, the online and the newspaper articles amounted to publication (see paras 16–17); *S Pakianathan v Jenni Ibrahim & Another Case* [1988] 2 MLJ 173 referred.

(3) In determining whether the words complained of are defamatory one must take into account not only the actual words but the context in which they were used. This is because there may be other words which take away the sting. The test is whether the words complained of in their natural and ordinary meaning 'impute to the plaintiff of any dishonorable or discreditable conduct or motive or lack of integrity' (see paras 19–20); *Soh Chun Seng v CTOS-Emr Sdn Bhd* [2003] 4 MLJ 180 referred; *Chok Foo Choo v The China Press Bhd* [1999] 1 MLJ 371 referred.

(4) The online publication was defamatory. Although content of the publication was the same as the letter of complaint, the title of the publication was 'Jangan Hantar Anak ke Taska Starkids, Likas, Kota Kinabalu'. Hence, the motive of this publication was to inform the public not to send their children to the nursery and she gave her reasons by posting the content of the letter of complaint. Reading the online posting, the words used had lowered the plaintiffs' reputation in the estimation of right-thinking members of society generally. It would undoubtedly cause others to shun or avoid the plaintiffs bearing in mind

A the second plaintiff owned a nursery. On the same grounds, the newspaper report was also defamatory (see paras 24–27).

(5) The burden to prove justification was on the defendants. The two issues that the first defendant had to justify were: (a) the alleged skin problem; B and (b) the alleged misconduct. In relation to the first issue, the first defendant had stated that the skin problem may be contagious. There was no evidence in court by any doctor who had examined the first plaintiff on his skin problem. Nor was there any evidence of her child or other children in that nursery contacting such skin issue. Accordingly she had C failed to prove justification for her defamatory comment on the skin issue. In relation to the second issue, the evidence of the defendants was more credible. The defendants had on a balance of probability proved the truth of the allegation made on the online publication in relation to the second issue (see paras 30–41).

D

[Bahasa Malaysia summary

Tuntutan plaintif-plaintif adalah untuk ganti rugi yang berasaskan tiga penerbitan fitnah yang didakwa disebabkan atau dibuat oleh kedua-dua defendan seperti yang berikut: (a) Surat aduan yang disebarkan oleh defendan E pertama kepada Jabatan Perkhidmatan Kebajikan Am Negeri Sabah ('JPKANS'); (b) Terbitan secara *online* di laman sesawang di alamat sesawang www.iusticetomyson.blogspot.com ('terbitan *online*') berkenaan dengan aduan yang sama; dan (c) artikel akhbar. Plaintif-plaintif adalah pasangan suami istei dan merupakan pemilik tunggal dan gurubesar pusat asuhan F 'Starkids Nursery Playschool'. Defendan-defendan telah mendaftarkan anak mereka yang berusia satu tahun McCain Lai di pusat asuhan tersebut. Menurut defendan pertama, terdapat beberapa kejadian di mana kesan lebam atau kecederaan lain didapati pada badan McCain apabila dia mengambilnya dari pusat asuhan tersebut. Defendan pertama juga mendakwa bahawa dia sedar G kulit jari plaintif pertama kelihatan sangat kering dan mengelupas. Defendan-defendan mendakwa bahawa apabila mereka meminta dipulangkan semula yuran sekolah, plaintif pertama menjadi marah, cuba untuk membuka zip seluarnya dan berkata, 'What do you want me to show you, why should I show you, I show you this lah'. Akibat daripada kejadian tersebut, adalah H didakwa bahawa defendan-defendan telah menyebabkan ketiga-tiga terbitan untuk dikeluarkan. Dakwaan defendan pertama adalah bahawa plaintif pertama mempunyai 'skin problem' dan dia telah cuba menunjukkan alat sulitnya kepada defendan-defendan. Plaintif-plaintif mendakwa bahawa perkataan-perkataan yang digunakan dalam terbitan *online* timbul, antara lain, I melalui sindiran dan/atau kiasan bahawa defendan pertama: (a) adalah kotor dan tidak sihat; (b) mempunyai penyakit kulit yang tidak dapat diubat dan berjangkit pada jari-jarinya; (c) adalah suatu risiko kesihatan dan seharusnya dihindarkan; (d) adalah seorang yang seksual/gila seks dan berkemungkinan besar untuk membuka seluarnya dan menunjukkan bahagian sulitnya; dan (e)

mempunyai penyakit otak dan mempunyai risiko seksual terhadap kanak-kanak dan wanita. Isu-isu yang timbul untuk penentuan adalah: (i) sama ada ketiga-tiga terbitan adalah bersifat fitnah; dan (ii) sekiranya ianya berunsurkan fitnah, sama ada ketiga-tiga tuduhan fitnah adalah benar menurut s 8 Akta Fitnah 1957.

Diputuskan, membenarkan tuntutan plaintif-plaintif dengan kos:

(1) Surat aduan boleh dikendalikan dalam konteks kepentingan bersyarat. Kekebalan ditarik sekiranya didapati bahawa wujud niat jahat sebenar oleh defendan-defendan. Defendan-defendan sebagai ibu bapa berhak untuk membuat aduan kepada pihak berkuasa berkenaan dan apabila pihak berkuasa tersebut mempunyai kewajipan perundangan untuk mendengar aduan-aduan tersebut, surat tersebut adalah dilindungi oleh konsep kepentingan bersyarat. Pihak berkuasa yang relevan dalam kes ini adalah JPKANS. Selanjutnya tidak terdapat keterangan niat jahat pada pihak defendan-defendan, dan oleh demikian surat aduan tersebut dilindungi oleh kepentingan bersyarat. Justeru, adalah tidak perlu untuk menentukan sama ada surat itu adalah berunsur fitnah (lihat perenggan 8–12).

(2) Surat aduan, artikel *online* dan surat khabar membawa kepada penerbitan; (lihat perenggan 16–17); *S Pakianathan v Jenni Ibrahim & Another Case* [1988] 2 MLJ 173 dirujuk.

(3) Untuk menentukan sama ada perkataan-perkataan yang diadu adalah berunsur fitnah seseorang perlu mengambil kira bukan sahaja perkataan sebenar tetapi juga konteks ianya digunakan. Ini adalah kerana mungkin terdapat perkataan yang lain yang boleh menghilangkan sengat. Ujiannya adalah sama ada perkataan yang diadu dalam maksud semulajadi dan biasa 'impute to the Plaintiff of any dishonorable or discreditable conduct or motive or lack of integrity' (lihat perenggan 19–20); *Soh Chun Seng v CTOS-Emr Sdn Bhd* [2003] 4 MLJ 180 dirujuk; *Chok Foo Choo v The China Press Bhd* [1999] 1 MLJ 371 dirujuk.

(4) Terbitan *online* tersebut adalah berunsur fitnah. Meskipun kandungan terbitan itu adalah sama seperti surat aduan, tajuk terbitan tersebut adalah 'Jangan Hantar Anak ke Taska Starkids, Likas, Kota Kinabalu'. Oleh itu, motif terbitan ini adalah untuk memberitahu orang awam untuk tidak menghantar anak-anak mereka ke pusat asuhan tersebut dan dia telah memberikan sebab-sebab dengan mengeposkan kandungan surat aduan tersebut. Membaca terbitan *online* tersebut, perkataan yang digunakan merendah-rendahkan reputasi plaintif-plaintif pada pandangan ahli-ahli masyarakat yang boleh berfikir secara umum. Ia tanpa disangsi lagi boleh menyebabkan orang lain menjauhi atau

mengelak plaintif-plaintif melihatkan plaintif kedua mempunyai pusat asuhan. Atas alasan yang sama, laporan suratkhabar juga adalah bersifat fitnah (lihat perenggan 24–28).

(5) Beban untuk membuktikan justifikasi adalah pada defendan-defendan. Kedua-dua isu yang perlu dijustifikasikan oleh defendan pertama adalah: (a) masalah kulit yang didakwa; dan (b) kelakuan tidak senonoh yang didakwa. Berkenaan dengan isu pertama, defendan pertama telah menyatakan bahawa masalah kulit tersebut mungkin boleh berjangkit. Tidak terdapat apa-apa keterangan dalam mahkamah oleh mana-mana doktor yang memeriksa masalah kulit plaintif pertama. Ataupun terdapat mana-mana keterangan tentang anaknya atau kanak-kanak lain di dalam pusat asuhan mempunyai masalah kulit tersebut. Berikutan itu dia gagal untuk membuktikan justifikasi untuk komen fintnahnya tentang masalah kulit tersebut. Berkenaan dengan isu kedua, keterangan defendan-defendan adalah lebih boleh dipercayai. Defendan-defendan atas imbangan kebarangkalian membuktikan kebenaran dakwaan yang dibuat dalam terbitan *online* berkenaan denggan isu kedua (lihat perenggan 30–41).]

Notes

For cases on defences, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 391–414.

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 484–645.

Cases referred to

Adam v Ward [1917] AC 309; [1916–17] All ER Rep 157, HC (refd)

Chok Foo Choo @ Chok Kee Lion v The China Press Bhd [1999] 1 MLJ 371, CA (refd)

Noor Asiah bte Mahmood & Anor v Randhir Singh & Ors [2000] 2 MLJ 175; [2000] 5 CLJ 407, HC (refd)

Ratus Mesra Sdn Bhd v Shaikh Osman Majid & Ors [1999] 3 MLJ 529; [1999] 8 CLJ 499, HC (refd)

S Pakianathan v Jenni Ibrahim & Another Case [1988] 2 MLJ 173; [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233, SC (refd)

Smith v Streatfield [1913] 3 KB 764 (refd)

Soh Chun Seng v CTOS-Emr Sdn Bhd [2003] 4 MLJ 180; [2004] 5 CLJ 46, HC (refd)

Toogood v Spyring (1834) 1 CM & R 181 (refd)

Legislation referred to

Civil Law Act 1956 s 11

Defamation Act 1957 s 8

Lim Pit Kong (PK Lim & Co) for the plaintiff.

Ronny Cham (Ronny Cham & Co) for the defendant.

David Wong J:

PROCEEDINGS

[1] The plaintiffs' claim is for damages premised on three alleged defamatory publications caused or made by both the first and second defendants and they are as follows:

(a) the letter of complaint circulated by the first defendant to Jabatan Perkhidmatan Kebajikan Am Negeri Sabah;

(b) the online publication in the website at the web address of www.iusticetomyson.blogspot.com (the online publication) regarding the same complaint; and

(c) the newspaper article that was reported by PW3.

[2] The damages as pleaded in the statement of claim is up to RM500,000 and aggravated and/or exemplary damages.

BACKGROUND FACTS

[3] Both the plaintiffs are husband and wife and according to the first plaintiff, the second plaintiff was at all material time the sole proprietor and principal of 'Starkids Nursery Playschool' ('nursery'). Both the defendants had enrolled their one year old son McCain Lai Bing Xue to the nursery on 12 October 2009 and such enrolment was then renewed on 11 January 2010. According to the first defendant, there were several occasions where bruises or other injury were found on McCain's body when she went to pick him up from the nursery with the husband. The first defendant also testified that on 11 May 2010, she noticed the skin on the first plaintiff's fingers was very dry and they were peeling off. She noticed that when the first plaintiff was trying to hold McCain's face and examine the injury as complained.

[4] On 14 May 2010, according to the defence, both the defendants went back to the nursery and demanded for a refund of the school fees. It was the contention of both the defendants that the first plaintiff became angry, trying to unzip his pants and said 'What do you want me to show you, why should I show you, I show you this lah'.

[5] As a result of such incident, it is alleged that both the defendants had made or caused three publications which will be produce in their totality later

in my judgment.

ISSUES

[6] From the evidence adduced and the submissions put forth by counsel, there are basically two determinative issues and they are as follows:

(a) whether or not the three publications are defamatory?; and

(b) if the answer to the question is in the affirmative, whether or not the defamatory imputations are true pursuant to s 8 of the Defamation Act 1957.

ISSUE 1

Whether or not the three publications are defamatory?

The letter of complaint

[7] For clarity and completeness, the letter is produced in its totality:

Cristlina @ Cristilla Korok
Lot 6, Ground Floor, Block J
Donggongon New Township
88807 Penampang, Sabah

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17 Mei 2010
Pengarah
Jabatan Perkhidmatan Kebajikan Am Negeri Sabah
Tingkat 4&5, Wisma Kebajikan
Jalan Sembulan
88899 Kota Kinabalu, Sabah

PER: ADUAN MENGENAI PERKHIDMATAN DI TASKA STARKIDS, LIKAS

'Saya seperti nama di atas, ibu kepada McCain Lai Bing Xue yang berumur 1 tahun 9 bulan ingin merujuk kepada perkara.

Untuk pengetahuan pihak tuan, saya telah menghantar anak saya ke Taska Starkids, Likas, Kota Kinabalu dari 10 Oktober 2009 hingga 11 Mei 2010.

Dalam tempoh 8 bulan mereka menjaga anak saya di Taska tersebut, telah banyak kejadian-kejadian seperti kesan-kesan lebam, gigitan dan cakaran yang berlaku dan terjadi ke atas anak saya, bersama ini saya lampirkan sesalinan laporan polis mengenai kecuaian Taska tersebut untuk rujukan dan tindakan pihak tuan.

Selain itu, saya ingin juga mengadu mengenai perkara-perkara di bawah untuk perhatian dan tindakan selanjutnya daripada pihak tuan:' A

6 'Kesihatan dan Kebersihan diri Majikan

Walaupun pengetua lelaki, MR CHAN hanya datang sekali-sekali untuk memantau pergerakkan Taska, dapat saya perhatikan bahawa pengetua ini mempunyai masalah kulit di bahagian jari. Memandangkan tugas rutin beliau memerlukan beliau untuk memegang kanak-kanak, saya risau kulit beliau akan menjangkiti kanak-kanak yang lain dan memudaratkan kesihatan mereka.' B

7 'Perilaku dan Budi Bahasa Majikan

Pada 14 Mei 2010, pada 12.30 pm, saya dan suami telah berjumpa dengan pihak Taska untuk meminta yuran pembayaran yang telah dibayar pada 11 Mei 2010 tetapi kami telah dilayan dengan buruk dan dihalau. Pihak Taska tidak mahu mengeluarkan resit penerimaan dan tidak mahu mengembalikan yuran tersebut walaupun kami tidak lagi menghantar anak sejak 11 Mei 2010. Pengetua lelaki iaitu MR CHAN telah mengoyakkan surat kami dan membuangnya ke luar Taska. Beliau telah menunjukkan perilaku tidak senonoh yang tidak sepatutnya dilakukan oleh seorang pengetua sekolah serta membuat satu gangguan seksual apabila cuba menanggalkan seluarnya di depan saya.' C D

'Saya berharap wajarlah taska, pemilik taska dan pekerja-pekerjanya disiasat semula. Saya juga merasakan adalah tidak adil dan pilih kasih sekiranya taska ini diberikan peluang untuk mendapatkan lessen beroperasi serta perakuan pendaftaran di atas perkara-perkara di atas. E

Pertimbangan dan perhatian daripada pihak tuan amat dihargai.'

Yang Benar, F

(CRISTLINA @ CRISTILLA KOROK)

811201-12-6232

AGREED TEXT TRANSLATION:

Cristlina @ Cristilla Korok Lot G

6, Ground Floor, Block J

Donggongon New Township

88507 Penampang, Sabah. H

RE: COMPLAINT ON SERVICES OF TASKA STARKIDS, LIKAS

I, the above-named, mother to McCain Lai Bing Xue of age 1 year 9 months, would like to refer to the above.

For your information, I sent my child to Taska Starkids, Likas, Kota Kota Kinabalu from 10 October 2009 till 11 May, 2010. Within the 8 months period whilst they took care of my child at that Taska, there had been many many incidents like bruise marks, teeth bite marks and scratches happened and found on my child, as to which and for your reference I attached herewith a copy of the police report on the physical abuse by the Taska. I

In addition, I would also like to high-light a few points below for your kind attention and further action:-

6. The Health and Cleanliness of the Employer

Even thought the male-Principle, Mr Chan only comes in once a while, I noticed that he has a skin problem at his fingers. I worried his skin problem could be contagious. which could infect the children he came into contact.

7. Ill-mannered and Vulgar Language of the Employer

On 14th May, 2010, at 12.30pm, my husband and I went up to the Taska to ask for refund of the fee we paid on 11th May, 2010 but were rudely chased away. The Taska did not issue us the payment receipt nor did they want to refund us the fee payment even though we had stopped sending our child to the Taska since 11th May, 2010.

The male-Principal Mr Chan torn off our letter and threw it outside the Taska. He showed rude and obscene gesture which was not befitting for a school principal; and he engaged act of sexual harassment by trying to take off his pant in front of me. I really hope that the taska concerned, owner-operator, and workers alike are brought in for investigation / questioning. I am also of the opinion that it would be grossly unfair and unjust if the taska were to be given an opportunity to obtain an operative licence and allowed for registration based on the above premise. Your kind consideration and attention is much appreciated.

Yours truly,

(CRISTLINA @ CRISTILLA KOROK)

811201-12-6232

[8] This publication can be dealt with in the context of qualified privilege, a legal principle of antiquity. In the case of *Toogood v Spyring* (1834) 1 CM & R 181 the court defines it as follows at p 193:

> In general, an action lies for malicious publication of statements which are false in fact, and injurious to the character of another, and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorised communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society.

[9] This immunity is of course taken away if it is found that there exists actual malice on the part of the defendants. Bankes J in *Smith v Streatfield* [1913] 3 KB 764 at pp 769–770 puts it this way:

> The principle upon which the law of qualified privilege rests is this: that where words are published which are both false and defamatory the law presumes malice on the part of the person who publishes them. The publication may, however, take place under circumstances which create a qualified privilege. If so, the presumption of malice is rebutted by the privilege, and … the plaintiff has to prove express malice on the part of the person responsible for the publication. The effect of proving express malice is sometimes spoken of as defeating the privilege … Although the occasion remains a privilege occasion, the privilege afforded by the occasion ceases to be an effective weapon of defence … Qualified privilege is a defence only to the extent that it throws on the plaintiff the burden of proving express malice. Directly the plaintiff succeeds in doing this the defence vanishes, and it becomes immaterial that the publication was on a privileged occasion.

[10] In *Adam v Ward* [1917] AC 309; [1916–17] All ER Rep 157 by Lord Finlay LC at p 318 and p 162 respectively defines what is qualified privilege as follows:

> The law of privilege is well settled. Malice is a necessary element in an action for libel, but from the mere publication of defamatory matter malice is implied, unless the publication were on what is called a privileged occasion. If the communication were made in pursuance of a duty or on a matter in which there was a common interest in the party making and the party receiving it, the occasion is said to be privileged. This privilege is only qualified, and may be rebutted by proof of express malice. It is for the judge, and the judge alone, to determine as a matter of law whether the occasion is privileged, unless the circumstances attending it are in dispute, in which case the facts necessary to raise the question of law should be found by the jury.

[11] The defendants as parents are entitled to lodge a complaint to the relevant authority and when such authority is under a legal obligation to hear such complaints, the letter is protected by the concept of qualified privilege. The authority in this case is Jabatan Perkhidmatan Kebajikan Am Negeri Sabah which is the relevant authority dealing with the child care nurseries and as such had the legal obligation to receive complaints similar to that of the first defendant. Further there is no evidence of malice on the part of the defendants, and as such there is little doubt in my mind that this letter of complaint is protected by qualified privilege.

[12] In view of my opinion, I find it unnecessary to determine whether that letter is defamatory.

The online publication

[13] For clarity and completeness, the publication is set out in its totality:

> Jangan Hantar Anak ke Taska Starkids, Likas, Kota Kinabalu, Sabah

A Monday, May 31, 2010

Kecuaian dan Keburukan di Taska Starkids, Likas

'Di Sabah sahaja, Taman Asuhan Kanak-Kanak (TASKA) ditubuhkan seperti cendawan tumbuh selepas hujan. Walaupun begitu, hanya puluhan taska sahaja yang telah diberikan perakuan pendaftaran daripada Jabatan Kebajikan. Adakah ini sempena menyambut seruan kerajaan atau adakah ini satu jalan pintas perniagaan yang menguntungkan bagi sesebuan pihak?

Memang tidak dinaflkan bahawa permintaan untuk taska di Kota Kinabalu adalah tinggi memandangkan para ibu yang bekerja tidak lagi bergantung kepada pembantu rumah semat-mata untuk menjaga anak-anak. Seperti orang lain, saya juga mengharapkan perkhidmatan yang terbaik daripada pihak Taska. Saya kecewa apabila mendapati bahawa Taska di mana tempat saya menghantar anak selama 8 bulan dahulu adalah taska yang tidak mendapat perakuan daripada Jabatan Kebajikan lagi. Sebelum saya menghantar anak saya ke taska tersebut, pemilik dengan penuh bangga meyakinkan saya dan suami bahawa taska mereka ini adalah berdaftar di bawah Jabatan Kebajikan. Setelah membuat carian, terdapat beberapa perkara yang menyangsikan di taska tersebut yang membawa kepada penutup yang mengaibkan:'

6. Kesihatan dan Kebersihan diri Majikan

Walaupun pengetua lelaki, MR CHAN hanya datang sekali-sekali untuk memantau pergerakkan Taska, dapat saya perhatikan bahawa pengetua ini mempunyai masalah kulit di bahagian jari. Memandangkan tugas rutin beliau memerlukan beliau untuk memegang kanak-kanak, saya risau masalah kulit beliau akan menjangkiti kanak-kanak yang lain dan memudaratkan kesihatan mereka.'

7. Perilaku dan Budi Bahasa Majikan

Pada 14 Mei 2010, pukul 12.30pm, saya dan suami telah berjumpa dengan pihak Taska untuk meminta yuran pembayaran yang telah dibayar pada 11 Mei 2010 tetapi kami telah dilayan dengan buruk dan dihalau. Pihak Taska tidak mahu mengeluarkan resit penerimaan dan tidak mahu mengembalikan yuran tersebut walaupun kami tidak lagi menghantar anak sejak kejadian 11 Mei 2010. Pengetua lelaki iaitu MR CHAN telah mengoyakkan surat kami dan membuangnya ke luar Taska. Beliau telah menunjukkan perilaku tidak senonoh yang tidak sepatutnya dilakukan oleh seorang pengetua sekolah serta membuat satu ganguan seksual apabila cuba menanggalkan seluarnya di depan saya.'

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Posted by Cristilla at 9.43 AM.

About Me

Cristilla

AGREED TEXT TRANSLATION:

http://justicetomyson.blogspot.com/

Don't Send your Child to Starkids Nursery, Likas, Kota Kinabalu, Sabah

Monday, May 31, 2010

Violence and Abuse in Taska Starkids, Likas

In Sabah alone, childcare service centres have sprang up rapidly and flourished like mushroom after rain. But only a handful of these Taska are acknowledged as being qualified for registration by the Jabatan Kebajikan merely a get-rich-quick scheme for the 'flight-by-night' taska operators?

It is undeniable that the taska services in Kota Kinabalu is much sought after due to the high number of working mothers who simply cannot depend on their housemaids to care for their young children.

Like other parents, I also hope to give my child the best. But I was disappointed when I found out the Taska that I had been sending my child to in the past 8 months is not recognised by the Jabatan Kebajikan. Before I sent my child there, the owner assured me and my husband with much pride that their Taska is registered with Jabatan Kebajikan. However, after much factfinding, I discovered a few oddities that led to their mystery-shrouded closure:

6. 'The Health and Cleanliness of the Employer

Even though the male-Principal, Mr Chan only comes in once a while, I noticed that he has skin problem at his fingers. I worried his skin problem could be contasious, which could infect the children he came into contact

7. Ill-mannered and Vulear Language of the Employer

On 14th May, 2010, at 12.30pm, my husband and I went up to the Taska to ask for refund of the fee we paid on 11th May, 2010 but were rudely chased away. The Taska did not issue us the payment receipt nor did they want to refund us the fee payment even though we had stopped sending our child to the Taska since 11th May, 2010. The male-Principal Mr Chan torn off our letter and threw it outside the Taska. He showed rude and obscene gesture which was not befitting for a school principal: and he engaged act of sexual harassment by trying to take off his pant in front of me.'

[14] It is the contention of learned counsel for the plaintiffs that the words used in the online publication gave rise by way of insinuation and/or innuendoes:

(a) that the first plaintiff is not healthy; and to be avoided;

(b) that the first plaintiff is dirty and unclean;

(c) that the first plaintiff has an incurable skin problem on his fingers;

(d) that the first plaintiff has a contagious skin problem on his fingers;

(e) that the first plaintiff is a health risk to all those that he comes into contact with including McCain;

(f) that the first plaintiff is to be shunned;

(g) that the first plaintiff is a sexual/sex pervert;

(h) that the first plaintiff is prone to taking off his trousers and to exhibit and/or flash his private part;

(i) that the first plaintiff is sick in the mind;

(j) that the first plaintiff is abnormal; and

(k) that the first plaintiff poses a sexual risk to children, women and others.

[15] It can be seen that those contentions stem from the first defendant's allegations that the first plaintiff had a 'skin problem' and he had attempted to show his genital to the defendants.

The law

[16] The meaning of publications is well defined in the case of *S Pakianathan v Jenni Ibrahim & Another Case* [1988] 2 MLJ 173; [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233, His Lordship Wan Hamzah SCJ in delivering the judgment of the Supreme Court said this at p 177 (MLJ); p 238 (CLJ (Rep)):

> In order to constitute publication, the defamatory matter must be published to a third party, and not simply to the plaintiff. By publication, it is meant the making known of defamatory matter, after it has been written, to some person other than the person to whom it is written. The uttering of a libel to the party libelled is no publication for the purposes of a civil action: *Wennhak v Morgan* …

[17] Applying the above principles to the present case, there is no doubt that the letter of complaint, the online and the newspaper articles amount to publication.

[18] As to what constitutes defamation, it is set out by *Gatley on Libel and Slander* (9th Ed), 1998 at p 7:

> What is defamatory? There is no wholly satisfactory definition of a defamatory imputation. Three formulaes have been particularly influential: (1) Would the imputation tend to 'lower the plaintiff in the estimation of right-thinking members of society generally'?; (2) Would the imputation tend to cause others to shun or avoid the plaintiff?; and (3) Would the words tend to expose the plaintiff to 'hatred, contempt or ridicule'?

[19] Hence in the Court of Appeal case of *Chok Foo Choo v The China Press*

Bhd [1999] 1 MLJ 371; [1999] 1 CLJ 461 Gopal Sri Ram JCA had set out the following at p 375 (MLJ), p 467 (CLJ):

> … the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonorable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory.

[20] I am mindful too that in determining whether the words complained of are defamatory one must take into account not only the actual words but the context in which they were used. This is because there may be other words which take away the sting. I also refer to *Soh Chun Seng v CTOS-Emr Sdn Bhd* [2003] 4 MLJ 180; [2004] 5 CLJ 46 where the following was stated:

> In Gatley …:
>
> It is necessary to take into consideration, not only the actual words used, but the context of the words.
>
> At p 97, … continues:
>
> It follows from the fact that the context and circumstances of the publication must be taken into account and that the plaintiff cannot pick and choose parts of the publication which standing alone, would be defamatory, but there may be other passages which take away the sting.

[21] In *Soh*, the court also referred to two other cases *Ratus Mesra Sdn Bhd v Shaikh Osman Majid & Ors* [1999] 3 MLJ 529; [1999] 8 CLJ 499 where it was stated at p 504 that '… it is necessary to consider the whole article' and *Noor Asiah bte Mahmood & Anor v Randhir Singh & Ors* [2000] 2 MLJ 175; [2000] 5 CLJ 407 where it states as follows:

> … that a claim for libel whilst not to be founded on a headline or photograph in isolation from the related text, the question whether the article was defamatory had to be answered by reference to the response of the ordinary reasonable reader to the entire publication.

[22] Gopal Sri Ram JCA (delivering the judgment of the Court of Appeal) in *Chok Foo Choo @ Chok Kee Lion v The China Press Bhd* [1999] 1 MLJ 371 (CA) clearly sets out the steps to be taken by the court:

> It cannot, I think be doubted that the first task of a court in an action for defamation is to determine whether the words complained of are capable of bearing a defamatory meaning. And it is beyond argument that this is in essence a question of law that turns upon the construction of the words published. As Lord Morris put it in *Jones v Skelton* [1963] 3 All ER 952 at p 958:

> The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be part of the ordinary and natural meaning of words (see *Lewis v Daily Telegraph Ltd* [1963] 2 All ER 151). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.

In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory. (*See JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334.) Richard Malanjum J, in an admirable judgment in *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393, collected and reviewed the relevant authorities upon this branch of the subject and I would, with respect, expressly approve the approach adopted by him.

[23] The test then is whether the words complained of in their natural an ordinary meaning 'impute to the plaintiff of any dishonorable or discreditable conduct or motive or lack of integrity'.

[24] After considering the context of the said online publication with great care, I am of the opinion that such publication is defamatory. My reasons are these. Although content of the publication is the same as the letter of complaint, the title of the publication was 'Jangan Hantar Anak ke Taska Starkids, Likas, Kota Kinabalu' (p 4 of exh A) (Translation: 'Don't Send Your Child to Starkids Nursery, Likas, Kota Kinabalu' — p 7 of exh A). Hence, the motive of this publication is to inform the public not to send their children to the nursery and she gave her reasons by posting the content of the letter of complaint dated 17 May 2010. Further reading the online posting, it is also my view that the words used had lowered the plaintiffs' reputation in the estimation of right-thinking members of society generally. It would undoubtedly cause others to shun or avoid the plaintiffs bearing in mind the second plaintiff owned a children nursery.

[25] With that I come to newspaper report.

Daily express report

[26] For clarity and completeness, the publication is set out in its totality:

Abuse alleged at playschool

Avila Geraldine Samuel

'KOTA KINABALU: It is every parents' worst nightmare and for Cristlina @ Cristilla Korok and her husband Edward Lai things only got worse when they suspected their toddler was being abused at school since last November.'

'They alleged that instead of at least promising to investigate, the co-Principal of the Likas Playschool-whose legality they also doubted-tried to flash his genitals at them in a fit of anger.'

'The playschool's other Principal is the wife and they flatly rejected the worried parents demand for a fee refund when they decided to pull their son out.'

'On May 11 they took their son out of school and on May 14 the couple went to the playschool to ask for a fee refund but was turned away.'

'The Principal tore our letter for a fee refund and asked us to go. We also demanded that they show relevant documents to prove that his playschool is registered but instead turned vulgar.'

'He said 'why should I show you… I show you this lah! while trying to undo his trouser zipper in front of me and my wife,' Lai said, adding that they then brought the matter to the relevant departments, including City Hall and the Welfare Department.'

[27] Adopting my earlier approach in analysing the online publication, I also find this publication to be defamatory.

[28] In view of my conclusion, I shall now deal with issue 2.

ISSUE 2

Whether or not the defamatory imputations are true pursuant to s 8 of the Defamation Act 1957?

[29] Section 8 provides as follows:

8. In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injured the plaintiff's reputation having regard to the truth of the remaining charges.

[30] The burden to prove justification is on the defendants. In *S Pakianathan v Jenni Ibrahim*, the Federal Court had held that the burden is on the defendant to establish justification by proving that the defamatory imputation is true. At pp 177–178, His Lordship Wan Hamzah SCJ said as follows:

> The burden lies upon the defendant to establish justification. The burden does not lie on the plaintiff to prove that the defamatory words are false, because the law presumes this in his favour: *Belt v Lowes*. To establish justification, the defendant must prove that the defamatory imputation is true. It is not enough for him to prove that he believed that the imputation was true …

[31] After going through the pleadings and the online publication, there are two issues that the first defendant must justify, they are:

(a) the alleged skin problem; and

(b) the alleged misconduct.

The alleged skin problem

[32] To recap this is what the first defendant said in her online publication:

> Even thought the male-Principle, Mr Chan only comes in once a while, I noticed that he has a skin problem at his fingers. I worried his skin problem could be contagious, which could infect the children he came into contact.

[33] In her evidence she said this:

> …Then the 1st Plaintiff reached out his hand to try to hold McCain's face and examine McCain's mouth and I noticed that both his hands especially fingers were with very dry skin and looking as if peeling off …

[34] If the first defendant had stopped at that in her publication, there would not be defamatory as I have no doubt that she was telling the truth as to what she saw. My view is premised on my observation of her demeanour in court when testifying and to certain extend corroborated by her letter of complaint to the Jabatan Perkhidmatan Kebajikan Am Negeri Sabah. However she went further on her online publication and states that it may be contagious and for her to justify that comment she is tasked in law to prove that that is true. Of course there is no evidence in court by any doctor who had examined the first plaintiff on his skin problem. Nor is there any evidence of her child or other children in that children nursery contacted such skin issue.

[35] Accordingly she had failed to prove justification for her defamatory comment on the skin issue.

The alleged misconduct

[36] The relevant contents of such allegation are these (p 6 of exh A):

Beliau (1st Plaintiff) telah menunjukkan perilaku yang tidak senonoh yang tidak sepatutnya dilakukan oleh seorang pengetua sekolah serta membuat satu gangguan seksual apabila cuba menanggalkan seluarnya di depan saya

[37] Translation (p 9 of exh A)

He (1st Plaintiff) showed rude and obscene gesture which was not befitting for a school principal, and he engaged act of sexual harassment by trying to take off his pants in front of me.

[38] The first defendant's evidence as to what had happened on 14 May 2010 is this:

Q17: On the 14.05.2010, can you tell the court what happened at the Playschool?

A: On 14.05.2010, my husband and I went back to the Playschool about 12.30 noon time. We were met by 3 child-minders including Wanne Binti Sahadin. One of them informed us that both the plaintiffs were not there. I handed over my letter withdrawing McCain from the Playschool and asking for refund of our fees of RM420.00 to one of the child-minders. Wanne Binti Sahadin apologised to us personally for causing McCain's bruise on the forehead. Just before we left, the 1st and 2nd Plaintiff came back to the Playschool. The 1st Plaintiff said to us, "I heard you have a letter for me". The 2nd Plaintiff walked passed us, open the gate and walked into the Playschool. The 1st Plaintiff then walked in and closed the gate on our face and did not invite us to go in. With the door half open, I saw the 2nd Plaintiff handed over to the 1st Plaintiff who read my letter at the door. Then he said to me that the policy of the Playschool was that there will be no refund of fees. The 2nd Plaintiff who stood just behind the 1st Plaintiff at the door then asked me where is McCain. I told them that we do not want to send McCain to the Playschool anymore because the doctor said that his injuries were because of being hit by objects. Then I handed over to the 2nd Plaintiff a letter from the doctor. I insisted on refund of our fees. Then, the 1st Plaintiff raised his voice and asked me why I complained to the Jabatan Hal Ehwal Wanita Sabah and before I can answer, he said, we have explained already, the matter is over and they have accepted their explanation. Then I show them I spoke to the 2nd Plaintiff and said that when I first enrolled my son to the Playschool she had said that the Playschool was registered under the Jabatan Kebajikan and I asked to see a copy of the certificate of registration of the Playschool. I also ask them to show me their DBKK trading licence. She did not answer, but the 1st Plaintiff because very angry and said he would not show us anything and he tore the doctor's letter in pieces. My husband then raised his voice and said, 'you don't try to be rude to us'. Then the 2nd Plaintiff said to my husband, 'you don't try to be uncivilised here'. I insisted again that they must show us the documents and almost shouted at me the 1st Plaintiff said, 'what do you want me to show you, why should

> I show you, I show you this lah'. While saying that, he pulled out his shirt and unzip his pant and was about to pull it down when the 2nd Plaintiff stopped him and said something in Chinese. When he did that, my husband in an act of protection, pulled me towards our car while the 1st Plaintiff was still shouting at us many things which I could not recall anymore as I was too emotional. I did not remember saying 'if you want to make it big, we will make it big'.

[39] Of course here, we have two conflicting version of the event. Except for the evidence of PW4 who is the child minder at the material time, the evidence is from the combating parties. PW4's evidence with respect does not help the court as she was hidden behind the door and could not have seen what had happened. From my observation of her demeanour in court, it can be easily seen that she came back to help her former employer.

[40] That being the case, I find the evidence of the defendants more credible. My reasons are these. Firstly unless one has a wild imagination, it is not credible to conclude that the first defendant would make up such a story of the first plaintiff's conduct. Secondly the first plaintiff so to say was in the defensive against the allegation by the first defendant and not too happy, in fact angry by the allegation. It is also not incredible to imagine what the first plaintiff did as the defendants were demanding for a refund of their fees. The emotions were running high to put it mildly. Thirdly again there is corroboration in the letter of complaint by the first defendant to Jabatan Perkhidmatan Kebajikan Am Negeri Sabah.

[41] For reasons stated above, I find that the defendants had on a balance of probability proved the truth of the allegation made on the online publication.

CONCLUSION

[42] For reasons stated above, I find that the first defendant is liable to the first and second plaintiff for the defamatory comments published on the online publication in respect of the first plaintiff's skin problem.

[43] Taking into consideration of the totality of evidence before me I make the following orders:

(a) a single global amount as general damages in the sum of RM10,000;

(b) interest at 4%pa on the adjudged sums/damages awarded to the plaintiffs pursuant to s 11 of the Civil Law Act 1956 with effect from 17 May 2010 until the date of judgment;

(c) statutory interest on the adjudged sums/damages awarded to the plaintiffs at the rate of 4%pa from the date of judgment until the date of full payment;

(d) an injunction to restraint the first and second defendants whether by themselves or by their agents, servants or otherwise howsoever from the publication of the said words or any of them or of any similar words or any words to the like effect as contained in the online publication and daily express newspaper; and

(e) costs in the sum of RM15,000.

Plaintiff's claim allowed with costs.

Reported by Kanesh Sundram